

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

MICHAEL STILL,)
)
 Appellant,)
)
 v.) C.A. No. K10A-10-004 RBY
)
 BURRIS LOGISTICS, and the)
 UNEMPLOYMENT INSURANCE)
 APPEAL BOARD,)
)
 Appellee.)

Submitted: May 5, 2011
Decided: August 2, 2011

*Upon Consideration of Appellant's Appeal
of the Decision of the
Unemployment Insurance Appeal Board*
AFFIRMED

Michael Still, *Pro se*.

Eric C. Howard, Esq., Wilson, Halbrook & Bayard, Georgetown, Delaware for
Appellee.

Young, J.

SUMMARY

Appellant Michael Still (“Still”) appeals the Unemployment Insurance Appeal Board’s (“UIAB or the Board”) denial of his unemployment benefits on the basis of his wrongful termination from Burriss Logistics. Because ample evidence existed to support the finding that Still, already in a tenuous employment situation, was justly discharged for his failure to report for work, the Board’s decision is **AFFIRMED**.

FACTS

The appellant was employed as a warehouseman by Burriss Logistics (“Burriss”) from June 28, 2002 through December 20, 2009. On December 20, 2009, Still was discharged from his employment, because he was absent the day following a substantial snowstorm. Prior to December 20, 2009, Still had been disciplined for attendance issues, previously suspended, and warned that his employment was at risk of termination in the event of a subsequent attendance incident.

Still made a claim for unemployment compensation. A Claims Deputy reviewed that claim, found that he was terminated for just cause, and denied the claim. Still appealed that determination to an Appeal Referee, who held an evidentiary hearing on February 25, 2010, and who reversed the decision of the Claims Deputy. Burriss appealed that ruling.

The Appeals Board held a hearing on June 15, 2010, considering the record it had as well as additional evidence. Following that, the Appeals Board reversed the Referee’s decision, and denied benefits to Still. This appeal followed.

STANDARD OF REVIEW

The scope of review of findings of the Unemployment Insurance Appeal Board is limited to a determination of whether there was substantial evidence sufficient to support the Board's findings.¹ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² On appeal, the court does not weigh evidence, determine questions of credibility, or make its own factual findings.³ If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.⁴

Pursuant to 19 *Del. C.* § 3314(2)⁵, an employee is ineligible to receive unemployment benefits if he or she has been terminated for just cause.⁶ The term "just cause" is defined as a "willful or wanton act in violation of either the employer's interests, or of the employee's duties, or of the employer's expected standard of

¹ *Unemployment Ins. Appeal Bd. of Dep't of Labor v. Duncan*, 337 A.2d 308, 308-09 (Del. 1975).

² *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).

³ *Id.*

⁴ *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. 2002).

⁵ The statute provides: "An individual shall be disqualified for benefits...[f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks..."

⁶ See also *Jackson*, 2008 WL 555918, at *2 (citing 19 *Del. C.* § 3314(2)).

conduct.”⁷ Willful or wanton conduct is “that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance.”⁸ Just cause exists where “an employee has violated an employer’s policy or rule, particularly where the employee received prior notice of the rule through a company handbook or other documentation.”⁹

DISCUSSION

Still contends that the Board did not have substantial evidence to deny his claim for unemployment benefits, thereby lacking just cause for the termination. Still disputes many of the facts found to be credible by the Board. He argues that he was never offered transportation. Furthermore, Still argues that he did everything in his power to attempt to go to work, but was prevented him from doing so by the snow conditions. Finally, Still contends that the Board did not fairly consider all of the evidence. Burriss Logistics, on the other hand, contends that the UIAB had substantial evidence to support its decision denying Still’s claim for unemployment benefits, based upon its finding that Still was terminated for just cause, and pursuant to standing company policy.

The Court uses a two prong test in determining whether termination for failing

⁷ *Jackson*, 2008 WL 555918, at *2 (quoting *Krouse v. Cape Henlopen Sch. Dist.*, 1997 WL 817846, at *3 (Del. Super. Oct. 28, 1997)).

⁸ *MRPC Fin. Mgmt. LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. Jun. 20, 2003).

⁹ *Toribio*, 2009 WL 153871, at *2 (citing *Mosley v. Initial Sec.*, 2002 WL 31236207, at *2 (Del. Super. Ct. Oct. 2, 2002)).

to follow a policy constitutes just cause. First, whether a policy existed, and, if so, what conduct was prohibited under the policy. Second, whether the employee was apprised of the policy, and, if so, how was he made aware.¹⁰ Knowledge of a company policy can be established by evidence of a written policy, such as an employer's handbook or by previous warning of objectionable conduct.¹¹

In the case at hand, the Board found that Burriss Logistics had an attendance policy of which Still was aware. At the very least, his awareness was developed by his prior violation history. This attendance policy included a limited amount of absences or "occurrences." There is no denying that Still exceeded the allotted amount of occurrences. Hence, the record clearly establishes the extant company policy, and Still's awareness of it.

The issue, then, becomes whether Still violated that policy; and, if so, whether the violation was excused. The Board concluded that Still failed to attend work on December 20, 2010, and that such failure exceeded his maximum allowable "occurrences" (the former being unrefuted, the latter presenting the primary issue). On Saturday, December 19, 2009, Still did not report to work, because the Governor of the State of Delaware declared a state of emergency, as a result of a substantial snowstorm. The state of emergency was lifted at 12:00 noon on Sunday, December 20, 2009. Still's typical start time on a Sunday is 2:00 p.m. Still asserts that, on Sunday, December 20, 2009, he contacted two shift guards at his place of employment to

¹⁰ *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at *3 (Del. Super. Feb. 7, 1996).

¹¹ *Id.*

provide notice that he would be unable to work as scheduled, because of the heavy snow, and his inability to travel.

Testimony from Larry Passwaters, Vice President of Distribution for Employer, was that he attempted to contact Still, to assure he was going to work and even to provide any needed transportation. This is certainly contested by Still. He contends that transportation was never offered to him on December 20.

Evidence in the record indicates that, of the employer's 70 employees, only 5 (or possibly 7, according to Still) failed to report to work on the day at issue. Others called the employer and arrived late. Despite the road conditions, the employer's vehicles were able to maneuver on the road. Still was paid to work a 40-hour work week. The employer's policy gave "occurrences" for days missed. Each employee was allotted a maximum permissible amount of occurrences. Still was at the limit before his absence on December 20th. He had had his two previous suspensions in approximately three years.

The Board found that Burris presented evidence that Still's conduct was wanton and willful, and satisfied the burden of proving that just cause existed to terminate Still. The Board noted that unquestionably travel was difficult. Nevertheless, it found Mr. Passwaters' testimony was more credible than Still's in establishing that the employer was willing and able to provide Still with transportation.

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CONCLUSION

Pursuant to the foregoing, the Board (reversing the Referee and accepting the original finding of the Claims Deputy) denied Still's claim for benefits. The record amply supports this finding. The positions asserted by Still, some of which could have been justified had the Board elected to adopt them after its hearing, have evidentiary support. Each, however, is contradicted by other evidence, upon which the Board was entirely justified in relying. The Board did not err in denying unemployment benefits to Still.

Accordingly, the decision of the Board is **AFFIRMED**.

SO ORDERED.

/s/ Robert B. Young

J.

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